

2004

Lynn G. Foster v. Evelyn L. Saunders; Saunders & Saunders; Gary Couillard; and Cathie I. Foster : Opening Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNN G. FOSTER,

Plaintiff and Appellant,

-VS-

EVELYN L. SAUNDERS; SAUNDERS &
SAUNDERS; GARY COUILLARD; and
CATHIE I. FOSTER,

Defendants and Appellees.

Appeal No. 20040527-CA

OPENING BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENTS AND ORDERS OF THE HONORABLE
WILLIAM B. BOHLING, THIRD JUDICIAL DISTRICT COURT JUDGE

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UTAH COURT OF APPEALS
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UTAH APPELLATE COURTS

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STATEMENT REGARDING PRIOR OR RELATED APPEALS

There are no prior appeals and no related pending appeals.

TABLE OF CONTENTS

	<u>Page</u>
Jurisdiction	1
Statement of Issues Presented On Appeal	1
Applicable Statutes And Rules	2
Statement of the Case	2
A. Nature of the Case.	2
B. Course of Proceedings.	5
C. Disposition By Trial Court.	6
Statement of Facts	6
Summary of Argument	11
Argument	13
I. LEGAL STANDARDS OF REVIEW APPLICABLE TO RULE 12(B)(6) AND RULE 56 DECISIONS.	13
A. Standards Applicable to Rule 12(b)(6) Motion.	13
II. COUNT II AND III ADEQUATELY PLEAD SLANDER OF TITLE; THEY DO NOT PLEAD SUFFICIENT FACTS TO MAKE OUT ANY AFFIRMATIVE DEFENSES.	26
A. The Affirmative Defense Of Judicial Privilege Was Not Proved Based On the Amended Complaint's Allegations.	26
B. The Affirmative Defense Of Statute of Limitations Was Not Proved Based On the Amended Complaint's Allegations.	30
C. The Affirmative Defense Of Claim Preclusion Was Not Proved Based On the Amended Complaint's Allegations.	32
IV. The Trial Court Abused Its Discretion In Failing To Allow Discovery On Counts IV and V Before Considering Summary Judgment.	37

TABLE OF CONTENTS

Page

CONCLUSION 37

Certificate of Service 38

Addenda:

- 1 UTAH R. CIV. P. 56
- 2 Order, dated October 6, 2003, granting motion to dismiss
3. Order, dated January 23, 2004, granting motion for summary judgment
4. Order appended to Stipulation to Entry of Order of Summary Judgment in Favor of Defendant Couillard, dated March 25, 2004
5. Minute Entry Decision and Order, dated May 24, 2004, denying motion to alter or amend judgment

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>Albertson v. Raboff</i> , 46 Cal. 2d 375, 295 P.2d 405 (1956)	17, 27
<i>Baird v. Intermountain School Federal Credit Union</i> , 555 P.2d 877 (Utah 1976)	17
<i>Bass v. Planned Management Servs., Inc.</i> , 761 P.2d 566 (Utah 1988)	30, 31
<i>Bennett v. Jones Waldo Holbrook & McDonough</i> , 2003 UT 9, 70 P.3d 17	23, 24
<i>Blackham v. Snelgrove</i> , 3 Utah 2d 157, 280 P.2d 453 (1955)	13, 14
<i>Brown v. Weis</i> , 871 P.2d 552 (Utah App. 1994)	1
<i>Colman v. Utah State Land Board</i> , 795 P.2d 622 (Utah 1990)	14, 32
<i>Crowley v. Katleman</i> , 8 Cal. 4th 666, 881 P.2d 1083, 34 Cal. Rptr. 2d 386 (Cal. 1994).	25
<i>DeBry v. Godbe</i> , 1999 UT 111, 992 P.2d 979	23
<i>Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints</i> , 2004 UT App. 274, ____ P.3d ____	1, 13
<i>Gilbert v. Ince</i> , 1999 UT 65, 981 P.2d 841	15, 16
<i>Greenberg v. Wolfberg</i> , 890 P.2d 895 (Okla. 1995)	18
<i>Grynberg v. Questar Pipeline Co.</i> , 2003 UT 8, 70 P.3d 1	2

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>Hansen v. Kohler</i> , 550 P.2d 186 (Utah 1976)	27, 28
<i>Howard v. Hudson</i> , 259 F.2d 29 (9th Cir. 1958)	32
<i>Jensen v. IHC Hospitals, Inc.</i> , 944 P.2d 327 (Utah 1997)	15
<i>Mountain States Telephone & Telegraph Co. v. Atkin</i> , <i>Wright & Miles, Chartered</i> , 681 P.2d 1258 (Utah 1984)ed, 681 P.2d	15
<i>Price v. Armour</i> , 949 P.2d 1251 (Utah 1997)	21, 23, 26
<i>Riddle v. Perry</i> , 2002 UT 10, 40 P.3d 1128	22
<i>Russell v. Standard Corp.</i> , 898 P.2d 263 (Utah 1995)	14
<i>Silver v. Mendel</i> , 894 F.2d 598 (3d Cir. 1990)	20
<i>SME Industries, Inc. v. Thompson, Ventulett, Stainback, and Assoc., Inc.</i> , 28 P.3d 669, 2001 UT 54	15
<i>Snow v. Rudd</i> , 998 P.2d 262, 2000 UT 20	13
<i>St. Benedict's Dev. Co. v. St. Benedict's Hosp.</i> , 811 P.2d 194 (Utah 1991)	14
<i>Taghipour v. Jerez</i> , 2001 UT App. 139, 26 P.3d 885	31
<i>Tucker v. State Farm Mutual Automobile Ins. Co.</i> , 2002 UT 54, 53 P.3d 947	26, 33

TABLE OF AUTHORITIES

Page

Cases

<i>Valley Colour v. Beuchert Builders, Inc.</i> , 944 P.2d 361 (Utah 1997)	30
<i>Winters v. Schulman</i> , 1999 UT App. 119, 977 P.2d 1218	28
<i>Wright v. Lawson</i> , 530 P.2d 823 (Utah 1975)	27

Statutes:

Utah Code Ann. § 25-5-1	2
Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-2-2(4)	1
UTAH CODE ANN. § 78-12-26(1)	31
UTAH CODE ANN. § 78-12-29(4)	30
UTAH CODE ANN. § 78-27-56	21

Rules

UTAH R. CIV. P. 12(b)(6)	1, 2, 4, 5, 13, 14, 16, 26, 28-30, 32, 33
Utah R. Civ. P. 56(c)	2, 4-6, 15
UTAH R. CIV. P. 56(f)	1, 5, 6, 36
UTAH R. CIV. P. 64D(l)	2

TABLE OF AUTHORITIES

	<u>Page</u>
UTAH R. CIV. P. 69	2
Utah R. Civ. P. 8(a)	13
Utah R. Civ. P. 8(e)(1)	13
Utah R. Civ. P. 8(f)	13

Other Authority

RESTATEMENT (SECOND) OF TORTS	20-22
RESTATEMENT (SECOND) OF TORTS § 435	34
RESTATEMENT (SECOND) OF TORTS, § 674 (1977)	17, 18
RESTATEMENT (SECOND) OF TORTS, § 674 (1977)	17
RESTATEMENT (SECOND) OF TORTS, § 676	17
RESTATEMENT (SECOND) OF TORTS, § 586	22
RESTATEMENT (SECOND) OF TORTS, § 588	22

JURISDICTION

This matter was transferred to the Court of Appeals by the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has Jurisdiction to decide appellants' appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. **Issue:** Did the trial court err when it dismissed with prejudice Plaintiff's First, Second and Third Causes of Action, under UTAH R. CIV. P. 12(b)(6), for failure to state a claim?

Standard of Review: "Because the propriety of a 12(b)[6] dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard." *Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 2004 UT App. 274, ¶ 8, ___ P.3d ____.

2. **Issue:** Did the trial court err when it granted summary judgment in favor of Cathie and Couillard on Plaintiff's Fourth and Fifth Causes of Action?

Standard of Review: "Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. The appellate court reviews those conclusions for correctness, without according deference to the trial court." *Brown v. Weis*, 871 P.2d 552, 559 (Utah Ct. App. 1994) (citations omitted).

3. **Issue:** Did the trial court err when it overruled Plaintiff's Rule 56(f) objection?

Standard of Review: "We review a district court's rule 56(f) discovery

rulings for abuse of discretion.” *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 56, 70 P.3d 1, 14.

APPLICABLE STATUTES AND RULES

UTAH R. CIV. P. 12(b)(6):

Rule 12. Defenses and objections.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

UTAH R. CIV. P. 56, Summary judgment. See Addendum 1.

STATEMENT OF THE CASE

A. Nature of the Case.

This case deals with claims for the wrongful initiation, continuation or use of civil proceedings, arising out of a divorce case, a slander of a non-party to the divorce case's title to real estate, which real estate is not part of the marital estate in the divorce

case, and damages caused to one spouse by virtue of the other's filing of a false tax return that foreseeably resulted in an audit of the first.

The civil proceedings in which the misconduct complained of took place involved appellant, Lynn G. Foster ("Lynn"), who was a respondent in the divorce action of *Foster v. Foster*, Case No. 004600010, in the Third District Court, Summit County, State of Utah (the "Divorce Action"). Lynn's ex-wife, Appellee Cathie I. Foster ("Cathie") was the petitioner in the Divorce Action.

Cathie was represented in the Divorce Action by Appellees Evelyn L. Saunders ("Saunders") and the law firm of Saunders & Saunders ("Law Firm"). During the course of the Divorce Action, Saunders, on Cathie's behalf, and, Lynn claims, as an abusive litigation tactic designed to impose needless expense on him, asserted a series of meritless claims, upon which Lynn prevailed and Cathie lost. These claims included the assertion by Cathie that Lynn, although well past the age of 65, at which many Americans retire, could not only not retire, but that he could not in any way reduce his income-producing activities during his elderly years, because he had chosen to marry a woman many years younger than him. Cathie, aided by Appellee Gary Couillard ("Couillard"), her expert witness in the Divorce Action, asserted that assets owned by non-party entities, in which persons unrelated to the Divorce Action held ownership interests, could be ordered to be sold so that the Court could award Cathie \$1.2 million in cash, instead of a percentage interest in marital property. This contention was made, and re-made, despite the fact that such sum of cash was not available through the marital estate. A summary of the false statements and groundless arguments made by Cathie, Saunders and Couillard in the Divorce Action, which were not pleaded, but

which obviously “could be proved” are set forth below in the statement of facts.

Ultimately, the trial court in the Divorce Action ruled in Lynn’s favor on these, and other, meritless assertions. The trial court *expressly condemned* the utterly abusive waste of resources caused by the making of such groundless assertions, chastising Cathie, Saunders and Couillard as follows:

The court has seldom seen less credible analysis nor a more blatantly overworked file, with virtually no ultimate advancement of the client’s position. When the expert’s evidence (which was overwhelmingly passionate advocacy, not expert analysis) was considered in its totality, it did virtually nothing to aid the court’s determination of the issues. . . .In addition, both the expert and petitioner’s counsel chose to advance novel theories at significant cost in legal and accounting services to the client.

Amended Complaint, ¶ 11. (R. 19-20). At the trial court level in this case, Saunders attempted to suggest that Lynn was somehow “disgruntled” with his result in the Divorce Action, and that his motive in asserting this action was founded in such displeasure. It is difficult to square Judge Hilder’s rulings in favor of Lynn with any dissatisfaction on Lynn’s part and, indeed, nothing could be further from the truth, as Lynn prevailed on every major issue he litigated. In any event, under Rule 12(b)(6) and Rule 56, such a proposition against Lynn could not be assumed.

In addition to seeking recovery of all of the attorney fees, costs and expenses that were incurred by Lynn in responding to Cathie’s abusive litigation tactics, Lynn asserted two claims, as assignee, for slander of title. Each of the assignors is a separate legal entity, not a party to the Divorce Action, and one of which neither Lynn nor Cathie had any interest in. Nevertheless, Cathie slandered the good and marketable title of these two entities in real estate they own by virtue of a statement she

made in an affidavit. One publication of that affidavit occurred via its filing in the Divorce Action. While Cathie asserts that the judicial privilege applies to that statement, the good title to this real estate owned by these non-parties to the Divorce Action could not be pertinent to the marital estate that was at issue in the Divorce Action., as a matter of law. The trial court nevertheless dismissed, under UTAH R. CIV. P. 12(b)(6).

Finally, Lynn asserted claims against Cathy and Couillard for jointly participating in the filing of a false tax return by Cathie, the falsehoods in which foreseeably led to an IRS audit of Lynn's individual tax return. The trial court dismissed these causes under UTAH R. CIV. P. 56.

B. Course of Proceedings.

Defendants moved to dismiss all Counts of the Amended Complaint, shortly after they were served with process. The defendants supported their motions with materials external to the Amended Complaint. The trial court refused to consider such materials, and dismissed Count I of the Amended Complaint, for the wrongful initiation, continuation and use of civil proceedings claim, and Counts II and III of the Amended Complaint, for slander of the title of two non-parties' real estate, which claims were assigned to Lynn, under UTAH R. CIV. P. 12(b)(6), with prejudice, for failure to state a claim. At the same time, as to Counts IV and V, the trial court directed that the remaining defendants, Cathie and Couillard, re-assert their motion, as to Counts IV and V, by complying with the requirements of Rule 56, by setting forth factual statements as to which they contended there was no material dispute. Cathie made such a motion. Lynn responded to that motion with two Rule 56(f) affidavits, since discovery had not

yet even commenced, let alone been completed, and with such facts as he could present without discovery. The trial court implicitly denied the Rule 56(f) objection, because it granted summary judgment in favor of Cathie, on the remaining claims for breach of duty and interference, arising out of the filing of false tax returns by Cathie, under UTAH R. CIV. P. 56. Couillard then moved to join Cathie's motion, and Lynn stipulated that Couillard's position on those claims was identical with Cathie's, whereupon the trial court granted summary judgment to Couillard on Counts IV and V, as well, thereby resulting in a final judgment.

C. Disposition By Trial Court.

The trial court disposed of the first three causes of action on motion to dismiss, by dismissing the claims asserted therein with prejudice. The trial court granted summary judgment in favor of Cathie and Couillard on the fourth and fifth causes of action, thereby rendering final judgment on all claims against all parties.

STATEMENT OF FACTS

1. Foster Family Properties, L.L.C., a Utah Limited Liability Company ("FFP") is the owner of certain real estate located in Salt Lake County, State of Utah. Amended Complaint ("Am. Compl.") at ¶ 2; R. 18.

2. Foster Rentals, L.C., a Utah Limited Liability Company ("FRLC") is the owner of certain real estate located in Salt Lake County and in Utah County, State of Utah. Am. Compl. at ¶ 3; R. 18.

3. Lynn is an individual who currently resides in Salt Lake County, but earlier resided in Summit County, Utah, when he was a party respondent in a divorce action

styled *Cathie Foster, Petitioner v. Lynn G. Foster, Respondent*, Case No. 004600010, in the Third District Court, Summit County, State of Utah. Am. Compl. at ¶ 4; R. 18.

4. Defendant Cathie I. Foster (“Cathie”), Lynn’s ex-wife, was the petitioner in the above-referenced divorce action. Am. Compl. at ¶ 5; R. 18.

5. Defendant Evelyn L. Saunders (“Saunders”) is an attorney, licensed to practice law in the state of Utah and a member of the Utah State Bar, and represented Cathie in the divorce action. Am. Compl. at ¶ 6; R. 18.

6. The law firm of Saunders & Saunders is a general partnership consisting of defendant Evelyn L. Saunders and Barney R. Saunders, and is located in Park City, Utah (hereinafter “Law Firm”), which at all times was the employer of Saunders, and all acts of Saunders complained of herein were undertaken within the course and scope of her employment by Law Firm, which were also in truth and fact the acts of Law Firm, itself, and for which Law Firm is also liable. Am. Compl. at ¶ 7; R. 18.

7. Defendant Gary R. Couillard (“Couillard”) was hired by Saunders as an expert witness in the divorce action between Cathie and Lynn. Am. Compl. at ¶ 8; R. 19.

8. In addition to the standard issues raised in any divorce action, Saunders initiated, used and/or asserted meritless theories, bereft of any legitimate basis in either law, fact, or both. Am. Compl. at ¶ 9; R. 19. The trial court in the divorce action rejected these theories as typified in the following exchange:

Ms. Saunders: What she is going to do is we determined that she will only get alimony for the life expectancy as opposed to the 22 years of marriage. It will be 13.1 years. And when he is not around anymore, she’s got to look at what is it going to cost her to live for the rest of her life and it’s not - -

The Court: Try and support her at a level that she can prepare for these future years, you are really be [sic] default or effectively saying, "You are going to continue supporting me from the grave, because you are going to do a bunch up front so I can stay at that level."

The reality is when the obligor dies or remarries, it's a different world. It's rough, but it's a different world.

* * *

The Court: Have you got any legal support for this? I mean I do truly recognize it as creative. But do you have any legal support?

Ms. Saunders: I'm forging new law.

Tr. 134:25 - 135:19; R. 988-989.

9. In an effort to artificially inflate the value of the marital assets, Coulliard sought and obtained an unauthorized second appraisal from Phil Cooke on the K Street apartments. Phil Cooke was selected by Saunders and Cathie with Court approval. The initial appraisal was court ordered. The second was not, but resulted from Coulliard's private challenge to Cooke of his initial appraisal. The difference was \$80,000. The Court accepted the first and rejected the second K Street appraisal. R. 901- 904, 913.

10. Saunders and Couillard entered into an agreement with each other with respect to the advancement of these misplaced theories in the divorce action and each undertook one or more overt acts in furtherance thereof, thereby subjecting each of them to full liability as a co-conspirator for all of the damages caused by the conspiracy. As part of the conspiracy, Couillard intentionally misrepresented the facts of the case, and intentionally misrepresented expert opinions as valid when he knew they were not

valid in divorce cases, under the law, generally, under the facts of the case or under accepted accounting principles. Am. Compl. at ¶ 10; R. 19.

11. In his ruling in the divorce action, dated December 24, 2001, the Honorable Robert K. Hilder has specifically stated with respect to Couillard's participation in the conspiracy that:

The court has seldom seen less credible analysis nor a more blatantly overworked file, with virtually no ultimate advancement of the client's position. When the expert's evidence (which was overwhelmingly passionate advocacy, not expert analysis) was considered in its totality, it did virtually nothing to aid the court's determination of the issues.

R 668.

Indicting both Couillard and Saunders, Judge Hilder continued:

In addition, both the expert and petitioner's counsel chose to advance novel theories at significant cost in legal and accounting services to the client.

Am. Compl. at ¶ 11; R. 19-20, 668.

12. At least one of the meritless theories advanced by Saunders in the litigation was that Cathie and/or Lynn held some ownership interest in certain real estate owned by FRLC, and in other real estate owned by FFP, which Cathie had quit-claimed to the contrary. Am. Compl. at ¶ 12; R. 20.

13. Saunders caused Cathie to execute a false affidavit to that effect and Saunders then caused that false affidavit to be filed and published in the public record in the divorce litigation. Cathie did so knowing the averments in the affidavit to be false. Am. Compl. at ¶ 13; R. 20.

14. That affidavit specifically, and falsely, stated "there are numerous

commercial properties in which this Affiant [Cathie] and/or the Respondent [Lynn] have an ownership interest.” Am. Compl. at ¶ 14; R. 20, 30-32

15. In paragraph 5 of that affidavit, it falsely asserts that Cathie and/or Lynn owned legal title to property at 602, 612 and 614 East 300 South, in Salt Lake City, Utah, which property was in fact specifically and truthfully owned by FFP, pursuant to, among other things, a quit-claim deed signed by Cathie. Am. Compl. at ¶ 15; R. 20, 31.

16. The affidavit also falsely asserted, contrary to deeds signed by Cathie, that Cathie and/or Lynn owned 831 and 835 First Avenue, in Salt Lake City, 65 “N” Street in Salt Lake City, 830 East Sixth Avenue in Salt Lake City, 374 Fourth Avenue in Salt Lake City, 128 “K” Street in Salt Lake City, and 229 East 900 North and 244 East 950 North, both in Lehi, Utah, all of which belong to FRLC. Am. Compl. at ¶ 16; R. 20.

17. FRLC filed suit in the Third District Court, Salt Lake County, State of Utah against Lynn and Cathie, Case No. 010901668, and obtained a judgment and decree quieting title on July 30, 2001. The judgment is final, as no appeal was timely taken. Am. Compl. at ¶ 17; R. 21.

18. Without authority from Lynn, defendant Couillard prepared a Form 1040 joint return naming Lynn and Cathie for filing by Cathie, alone, for the year 2000, which Form was executed solely by Cathie only on March 14, 2001 and submitted to the Internal Revenue Service. Am. Compl. at ¶ 18; R. 21. That Form was false and fraudulent, and contained intentional misrepresentations by Couillard, in the following particulars:

- a. It purports to be “self-prepared” although Couillard prepared it.
- b. The form falsely claims exemptions for Lynn, Greg Foster and Brad

Foster, when there was no basis for an exemption for Lynn of any kind and Lynn provided more than one-half of the support for Greg Foster and Brad Foster and was, therefore, entitled to the exemptions for Greg Foster and Brad Foster.

c. Couillard falsely represented in his preparation of the form that it was a joint return when he knew that it was not, in fact a joint return. Couillard knew Lynn had previously filed separate 2000 tax returns.

Am. Compl. at ¶ 19; R. 21.

19. Cathie authorized Saunders and Couillard to perform all of their actions as her agents, and their acts are therefore legally also the acts of Cathie for which she is liable. Am. Compl. at ¶ 20; R. 21.

SUMMARY OF ARGUMENT

Counts I, II and III of the Amended Complaint were dismissed by the trial court, with prejudice, pursuant to Utah R. Civ. P. 12(b)(6). That dismissal was erroneous, for the following reasons. Lynn properly pleaded the elements of each cause of action asserted in Counts I, II and III in sufficient fashion to comply with the notice pleading requirements of Utah R. Civ. P. 8. Defendants have fair notice of the claims against them and that is all that UTAH R. CIV. P. 8 requires.

Defendants had submitted materials extraneous to the Amended Complaint in support of affirmative defenses that they asserted by way of their UTAH R. CIV. P. 12(b)(6) motions. Although the trial court did not convert the motion to one under UTAH R. CIV. P. 56 and, therefore, could not have considered those extraneous materials, it improperly adjudicated the affirmative defenses in favor of defendants.

The affirmative defense of judicial immunity upon which the trial court relied to dismiss Count I is not applicable to the tort of wrongful initiation, continuation and/or use of civil proceedings. The judicial privilege does not apply to Counts II and III because the title held in real estate by Foster Rentals, LC ("FRLC") and Foster Family Properties LC ("FFP") was not at issue in the Divorce Action, those entities were not parties to the Divorce Action and both of those entities obtained a decree quieting title as between them and Cathie. The slander of title actions are not barred by statute of limitations because slander of title is an injury to real property which comes under the express three-year statute of limitations. Finally, claim preclusion does not bar FRLC's claim because its decree quieting title did not release any claim against Saunders' law firm and/or Couillard, who were not parties to that action and because the slander of title claim that was asserted in that action was dismissed without prejudice.

As to the summary judgment entered on the claims arising from Cathie's filing of a false joint tax return that led to an IRS audit of Lynn's individual tax return and damages flowing therefrom, such summary judgment was improper because of the genuine issues of material fact contained in Lynn Foster's affidavit, because other, material facts were held exclusively by defendants or non-parties and could not be obtained by Lynn since discovery had not even commenced and because the foreseeability of an IRS audit could not be determined at such an early stage of the case without developing the facts. The trial court's refusal to allow Lynn to conduct discovery before ruling on the motion for summary judgment was an abuse of discretion.

ARGUMENT

I. LEGAL STANDARDS OF REVIEW APPLICABLE TO RULE 12(B)(6) AND RULE 56 DECISIONS.

This case is before this Court for review of the dismissal with prejudice of Counts I, II and III of Lynn's Amended Complaint, under UTAH R. CIV. P. 12(b)(6), and the grant of summary judgment in favor of Cathie and Couillard on Counts IV and V. Both of these rulings are reviewable under a "correctness" standard. "Because the propriety of a 12(b)[6] dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard." *Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 2004 UT App. 274, ¶ 8, ___ P.3d ___. "A trial court's grant or denial of summary judgment is reviewed for correctness." *Snow v. Rudd*, 998 P.2d 262, 265, 2000 UT 20, ¶ 9.

A. STANDARDS APPLICABLE TO RULE 12(B)(6) MOTION.

In passing on the legal sufficiency of a complaint, which is what the motions brought by Saunders, Law Firm, Cathie and Couillard asked the trial court to do with respect to Counts I, II and III of the Amended Complaint herein, and which this Court must analyze in its "correctness" review, a Court must take into account the standards of UTAH R. CIV. P. 8(a), 8(e)(1) and 8(f). See *Blackham v. Snelgrove*, 3 Utah 2d 157, 159, 280 P.2d 453, 454 (1955)(To decide a motion to dismiss for failure to state a claim, "Rules 12(b)(6), 8(a), 8(e)(1) and 8(f) of the Utah Rules of Civil Procedure must together be construed and their proper interpretation applied.")

Rule 8(a) sets out what a complaint must contain in order to state a claim for relief: "A pleading which sets forth a claim for relief . . . shall contain (1) a *short and plain statement of the claim* showing

that the pleader is entitled to relief; and (2) a *demand for judgment*.” Rule 8(e)(1) provides in part: “*No technical forms of pleading or motions are required*.” And Rule 8(f) states: “All pleadings shall be so construed as to do substantial justice.”

Id. (emphasis added). Thus, a complaint is adequate if it “gives *fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved*.” *Id.*, 3 Utah 2d at 160, 280 P. 2d at 455 (emphasis added)..

As to the contents of the complaint itself, “[a] Rule 12(b)(6) motion to dismiss admits the facts alleged in the Complaint but challenges the Plaintiff’s right to relief based on those facts.” *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995) (quoting *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194-96 (Utah 1991)). The factual allegations of the Complaint must be accepted “as true” and they must be considered together with “all reasonable inferences to be drawn from them in a light most favorable to the Plaintiff.” *Id.*

Further, a “dismissal is a severe measure and should be granted by the trial Court only if it is clear that a party is not entitled to relief *under any state of facts which could be proved in support of its claim*.” *Coleman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990)(emphasis added). Thus, if any state of facts could exist that might support the pleaded claim, regardless of whether the facts are pleaded, a dismissal under Rule 12(b)(6) is not appropriate, because the Court must assume that those facts will, in fact, be proved at trial.

B. STANDARDS APPLICABLE TO RULE 56 MOTION.

“On a motion for summary judgment, the moving party [here, Cathie and Couillard on Counts IV and V] bears the burden of proof for its motion, namely, the

burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 329 (Utah 1997) (on rehearing). “Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *SME Industries, Inc. v. Thompson, Ventulett, Stainback, and Assoc., Inc.*, 28 P.3d 669, 673, 2001 UT 54, ¶ 9 (citing UTAH R. CIV. P. 56(c)).

“Doubts, uncertainties or inferences concerning issues of fact must be construed in the light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.” *Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (footnotes omitted).

II. LYNN PROPERLY PLEADED AND STATED A CLAIM FOR WRONGFUL INITIATION, CONTINUATION AND/OR USE OF CIVIL PROCEEDINGS.

A. Count I Adequately Pleads Wrongful Initiation, Continuation And/Or Use of Civil Proceedings.

Count I of the Amended Complaint asserts tort claims against all defendants for the wrongful initiation, continuation and/or use of civil proceedings. *Gilbert v. Ince*, 1999 UT 65, 981 P.2d 841, appears to be the most recent, controlling Utah authority on this tort cause of action that redresses injuries caused by abusive litigation tactics.

There are two elements to this cause of action:

The Restatement describes the pertinent criteria for wrongful use of civil proceedings as follows:

One who takes an active part in the initiation, continuation, or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he [or she] acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are *ex parte*, the proceedings have terminated in favor of the person against whom they are brought.

Id., ¶ 18, 981 P.2d at 845 (quoting RESTATEMENT § 674)). The Amended Complaint clearly pleads the elements of this cause of action. For example, the Amended Complaint alleges, at ¶¶ 23-24, R. 22, which allegations must be taken as true under UTAH R. CIV. P. 12(b)(6):

23. Each of the defendants acted without probable cause and primarily for a purpose other than that of securing the proper adjudication of the particular theories on which they proceeded.

24. With respect to the theories forming a part of this cause of action, the proceedings have terminated in favor of Lynn.

Amended Complaint, ¶¶ 23-24, R. 22. The defendants had fair notice of the pleaded claim. That is all that is required for Lynn to avoid dismissal under the standard of Rule 12(b)(6).

Cathie contended below that Lynn must expressly plead the term “malice.” It is unclear whether the trial court adopted such contention as a basis for its ruling, but if it did, it was in error. First, that is not what the Utah Supreme Court said in *Gilbert*. Second, malice, in the legal sense, is encompassed by pursuing claims “for a purpose other than that of securing the[ir] proper adjudication” as Lynn in fact has pleaded in ¶

23 of the Amended Complaint.¹ See *Albertson v. Raboff*, 46 Cal. 2d 375, 383, 295 P.2d 405, 410 (1956)(“The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but *exists when the proceedings are instituted primarily for an improper purpose* [emphasis added].”).

Cathie asserted below that there is no “winner” in a divorce action, and so there could never, as a matter of law, be a termination in favor of Lynn.² She cited no

¹In her memorandum supporting her motion to dismiss Count I, below, Cathie cited *Baird v. Intermountain School Federal Credit Union*, 555 P.2d 877 (Utah 1976) for an argument that Lynn must allege that the improper purpose was “harassment or annoyance.” Cathie Mem., at 4. First and foremost, the Utah Supreme Court in *Gilbert* reviewed existing Utah law on the tort, which included *Baird*. See *Gilbert*, 1999 UT 65 at ¶¶ 15, 19, 981 P.2d at 844-46. The Court then expressly adopted, “[t]o preserve analytical clarity with respect to the species of torts permitting suit for misuse of judicial proceedings . . . **the Restatement's formulation** of wrongful use of civil proceedings” as is set forth in RESTATEMENT (SECOND) OF TORTS, § 674 (1977)(emphasis added). Thus, any statements in *Baird* must give way to the RESTATEMENT elements adopted in *Gilbert*, which do not so limit the improper purpose that will support a claim. Second, the Court in *Baird* supported its statement concerning harassment or annoyance by citation to two cases and the RESTATEMENT. Yet none of those authorities in fact purport to so restrict the tort. Because *Baird* was decided in the first instance on the ground that the original claim was meritorious, see *Baird*, 555 P.2d at 878, rather than groundless, as the Supreme Court stated was the prerequisite for the tort, see *id.*, the statement concerning the secondary issue of harassment or annoyance at best was loose dictum. Under the RESTATEMENT, “instituting a civil proceeding when one does not believe his claim to be meritorious is not acting for the purpose of securing the proper adjudication of his claim.” RESTATEMENT (SECOND) OF TORTS, § 676, comment c. “He cannot believe that the claim is meritorious, however, if he knows that it is a false one based upon manufactured or perjured testimony, or if he realizes that the adjudication will not be in his favor unless the court or jury is misled in some way. He is then abusing the general purpose of bringing civil proceedings and is not seeking a proper adjudication of the claim on which the civil proceeding is based.” *Id.*

²Lynn is constrained to point out that, regardless of whether there are “winners” in divorce actions, there most certainly are issues and claims asserted by each party in a divorce action. When the Utah Supreme Court discussed the elements of the tort in *Gilbert*, it specifically adopted RESTATEMENT § 674, which covers far more abuses than the simple filing of an initial claim. The RESTATEMENT speaks of “acts” undertaken
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authority for that proposition, and the *Gilbert* decision, adopting the RESTATEMENT elements, does not purport to exempt spurious claims raised in divorce litigation from other meritless civil proceedings. The pleaded portion of Judge Hilder's ruling, see Amended Complaint, ¶ 11 (R. 19-20), certainly gives rise to inferences that Judge Hilder ruled against claims asserted by Cathie I. Foster in the divorce action, terminated those claims in favor of the Lynn herein, and expressed his dismay at the expense that those spurious theories caused.³ In addition, Lynn has expressly pleaded that result, see Amended Complaint, ¶ 24 (R. 22) ("With respect to the theories forming a part of this cause of action, the proceedings have terminated in favor of Lynn."), and nothing within the four corners of the amended complaint could compel a contrary conclusion. The full scope of Judge Hilder's ruling, the claims terminated in Lynn's favor and the expense to which Lynn was put defending spurious claims is a matter for discovery and trial. Since the allegations of the complaint must be taken as true, and all inferences

²(...continued)
without probable cause, in the "initiation, continuation, or procurement of civil proceedings against another" *Id.*

³Those, separate claims, are the ones Lynn's amended complaint herein properly pursues:

Where more than one claim is asserted in a proceeding, it is proper for the court to review each claim separately to determine if it satisfies the delict's critical elements.

If a claim is terminated in favor of the malicious-prosecution plaintiff, an action for malicious prosecution will lie on that singular claim, regardless of who prevails on other claims pressed in the same suit.

Greenberg v. Wolfberg, 890 P.2d 895, 904 (Okla. 1995).

drawn in favor of Lynn, and states of facts may be proved in support of the claim, it should not be dismissed.

Finally, Cathie asserted below that, because she relied entirely upon advice of Saunders and Law Firm, Lynn cannot, as a matter of law, assert a claim against her. The Amended Complaint pleads Cathie's lack of good faith, and willful conduct: "Each of the defendants acted without probable cause and primarily for a purpose other than that of securing [a] proper adjudication. . . ." Amended Complaint, ¶ 23 (R. 22); "The defendants either knew or should have known that the claims were not meritorious. . . ." *Id.* ¶ 26 (R. 22); "The actions of the defendants were undertaken intentionally, willfully and/or with a reckless disregard of the rights of Lynn. . . ." *Id.* ¶ 28 (R. 23). The Amended Complaint alleges that Cathie knowingly signed an affidavit falsely claiming that she or Lynn had an interest in real property that she knew she had previously deeded to two separate legal entities. See Amended Complaint, ¶¶ 12-16 (R. 20). Clearly, Cathie's lack of good faith is at issue, is subject to the full panoply of discovery and must be litigated. Cathie may choose to assert an affirmative defense in her answer that she acted in good faith reliance upon advice of counsel, but her contentions in that regard do not defeat the allegations of the Amended Complaint on a motion to dismiss.

B. The Defense of "Judicial Privilege" Is Inapplicable to the Tort of Wrongful Initiation, Continuation or Use of Civil Proceedings.

Saunders, Law Firm and Cathie argued below, and convinced the trial court, that they are immune from their misconduct in litigation, because of the "judicial privilege"

they are afforded under Utah law to fully and freely participate in judicial proceedings. This “privilege,” they argue, sanctions whatever misconduct they may commit, so long as it is “related to” the judicial proceeding.

That argument seems, on its face, to conflict with the very existence of the tort which is pleaded. It simply does not make any sense that the same RESTATEMENT (SECOND) OF TORTS (upon which, as will be discussed below, the Utah Supreme Court relied in its definition of the judicial privilege) would also be adopted by the Utah Supreme Court in defining the tort of wrongful initiation, continuation or use of judicial proceedings, if no one could assert the tort in the face of the privilege. At least one court has expressly addressed this seeming paradox and resolved it in favor of the viability of the tort of wrongful civil proceedings, stating:

The judicial privilege has long existed in jurisdictions which, like Pennsylvania, recognize the tort of wrongful use of civil proceedings. These two policies—protection of communications necessary to the litigation of claims and imposition of liability for wrongful use of civil proceedings—can coexist because imposition of liability for the wrongful use of civil proceedings occurs only when litigation is instituted both without probable cause *and* primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based and because, when these requirements are met, immunity for the filing of the complaint is not necessary to further the interests protected by judicial immunity.

Silver v. Mendel, 894 F.2d 598, 603-04 (3d Cir. 1990)(emphasis in original & footnote omitted).

A studied review of the judicial privilege provides an even more clear analytical path to separate the tort from the judicial privilege. Lynn’s claim in Count I is based on defendants’ wrongful **conduct** in initiating, continuing or pursuing meritless claims for

an improper purpose. Defendants below have attempted to mischaracterize Lynn's claims as being exclusively dependent on the false statements made by Cathie in her affidavit in the Divorce Action. Of course, the comments of Judge Hilder that are pleaded in the Amended Complaint go far beyond Cathie's submission of a bad faith and false affidavit, and this Court must, under Rule 12(b)(6), infer from Judge Hilder's scathing remarks, that many other facts exist that can be proved in support of the claim and to explain fully Judge Hilder's disgust with what he witnessed.

The tort differs in no material respect from Rules 11, 37 or 56(g), liability under UTAH CODE ANN. § 78-27-56 or the inherent powers of the court, or a contempt citation, with regard to litigation misconduct. Each of those is based on a "statement" in litigation, indeed, Rule 56(g) deals with bad faith affidavits, yet no "judicial privilege" has ever been recognized to offer sanctuary to a litigant, attorney or witness from the sanctions that flow from their misconduct in litigation in making these spurious and false statements, without probable cause or for, by their "statements," asserting and pursuing meritless claims. This is true even though the miscreant may, indeed, be privileged against all manner of damages for reputational injury, whether the claim be defamation, interference, emotional distress or otherwise. The public policy issues that preclude application of any "judicial privilege" to those sanctions apply with equal force to prohibit its application to a recognized tort cause of action to address abusive litigation tactics

The history and scope of the "judicial privilege" is not, in any event, so broad as the defendants would have this Court believe. The Utah courts have relied on the RESTATEMENT for their formulation of the "judicial privilege," *see, e.g., Price v. Armour*, 949 P.2d 1251 (Utah 1997), so the RESTATEMENT is a good starting point for any

analysis. The Scope Note for Division 5 of the RESTATEMENT (SECOND) OF TORTS notes that Chapter 25 of the RESTATEMENT deals with defenses to defamation-based claims. See RESTATEMENT (SECOND) OF TORTS 5 SC NT (1977). Topic 2 of Chapter 25 of the RESTATEMENT sets forth absolute privileges to defamation-based claims. RESTATEMENT § 585 sets forth the absolute privilege for judicial officers, RESTATEMENT § 586 sets forth the absolute privilege for attorneys at law, and RESTATEMENT § 588 sets forth the absolute privilege for witnesses. All of these “judicial privilege” defenses, as defined in the RESTATEMENT, are applicable exclusively to the Topic 2, Division 5 tort of **defamation**. The “judicial privilege,” such as it exists, therefore does not apply to any injury that does not flow from a statement due to its **defamatory nature**. Claims based on injury in the litigation, itself, due to misconduct, even if the misconduct is false statements to the Court misconduct, rather than any injury derived from a loss to reputation due to a statement, are simply not within the scope of the privilege as defined by the RESTATEMENT, nor as it has in fact been applied in Utah cases.

The Utah cases on “judicial privilege seem few in number. Defendants below appeared to rely on four cases. In *Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128, the Utah Supreme Court adopted RESTATEMENT § 590A, pertaining to witnesses before legislative bodies. *Id.* at ¶ 11, 40 P.3d at 1133. The claim was clearly a defamation claim, covered by the RESTATEMENT’s privileges against defamation claims. See *id.* at ¶¶ 4-5, 40 P.3d at 1131.

In *Price v. Armour*, 949 P.2d 1251 (Utah 1997), the Utah Supreme Court held that the judicial privilege was a bar to claims for damages for lost business opportunities

flowing from personal defamatory statements that interfered with business relations. See *id.* at 1258 (judicial privilege applies to all legal theories arising from operative facts constituting defamatory publication). In other words, the “interference” alleged in that case was that a defamatory statement in a letter was designed to “interfere” with the contractual relationship between the plaintiff, Price (a lawyer), and his client, who received the letter.

In *DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, the Utah Supreme Court held that the “judicial privilege” barred claims for damages flowing from emotional distress, when that emotional distress was caused by personal defamatory statements. Again in that case, the operative facts for the claim encompassed a defamatory letter, and the emotional distress claim depended entirely upon the defamatory nature of the communication in the letter. The entire discussion of the judicial privilege was within the context of a statement that was defamatory. See *id.* at ¶¶ 11-15, 992 P.2d at 983-84.

Defendants also relied on *Bennett v. Jones Waldo Holbrook & McDonough*, 2003 UT 9, 70 P.3d 17. A review of the facts of that case discloses that it, too, is of no aid to defendants. Specifically, when the Utah Supreme Court discussed the intentional infliction of emotional distress claim, the Utah Supreme Court noted that the allegations of Bennett's complaint for damages from intentional infliction of emotional distress were for “reputational damages.” See 2003 UT 9 at ¶ 65, 70 P.3d at 31. Likewise, on the deceit claim, the Utah Supreme Court, citing an earlier decision, stated: “The judicial proceeding privilege extends not only to defamation claims but to ‘all claims arising from the same statements.’” 2003 UT 9, at ¶ 77, 70 P.3d at 34. Thus, the judicial

proceedings privilege does not apply if there are not “statements” that would give rise to defamatory claims for “reputational damages” as well as other claims based on the injury to reputation. It is also important to keep in mind when reading the *Bennett* decision that its discussion of and pronouncements on judicial privilege appear to be entirely *obiter dicta*. The trial court had dismissed the intentional infliction of emotional distress and deceit claims on other grounds, which dismissal was affirmed by the Utah Supreme Court. The trial court apparently had not considered the issue of judicial privilege and it seems that the parties did not raise the issue. The question of judicial privilege was therefore not properly before the Utah Supreme Court for determination, did not need to be determined since the trial court's dismissal was affirmed on the grounds decided, and was not the holding of the Court.

Lynn's claim in Count I is not for damage flowing from any defamatory statement, but rather, it is for damages flowing from the need to defend against spurious litigation. The judicial privilege applies solely to claims flowing from the results of the personal defamatory nature of “defamatory statements,” albeit regardless of the legal theory utilized to assert those claims. Lynn's claim in Count I is based, not on any defamatory nature of statements, but instead, on defendants' conduct in asserting meritless claims. It is this wrongful conduct that has injured Lynn through the expense and other damages caused to Lynn by virtue of the assertion, continuation and/or use of those claims. The judicial privilege that applies to the making of defamatory statements is inapplicable to such conduct.

An almost identical situation arose in a probate proceeding in California, stemming from an unsuccessful will contest. The California Supreme Court, in bank,

reversed the grant of a general demurrer, determining that the abusive litigation tort was applicable even though not all grounds in the contest lacked probable cause. See *Crowley v. Katleman*, 8 Cal. 4th 666, 694, 881 P.2d 1083, 1099, 34 Cal. Rptr. 2d 386, 402 (Cal. 1994). In reaching that conclusion, the Court reasoned:

It is true that untrammelled access to the courts promotes social peace by providing the citizenry with an alternative to potentially dangerous self-help methods of redressing private grievances. But it is not an unmixed blessing: many of our courts are burdened by overcrowded dockets and long delays, and all litigation exacts both public and private costs. We are willing as a society to incur those burdens and costs when the litigation is well founded or, even when ultimately unsuccessful, was at least initiated with probable cause and without malice. In those circumstances the balance tips in favor of the policy of encouraging judicial access. That policy becomes counterproductive, however, when it operates to promote litigation that is groundless and motivated by malice; such litigation has no place in our judicial system, and we are therefore unwilling to bear its costs. After careful consideration, we see no reason to reach a different result when the litigation in question is the assertion of baseless and malicious grounds of liability in a single lawsuit: in both instances the balance tips in favor of the policy of making whole the individuals harmed by such abuse of our courts.

Id. (footnote omitted). There is no distinction between the reasoned basis for the rule's application in that case, from its application here. Where defendants conspired to maliciously assert baseless claims in the divorce and run up Lynn's litigation costs, Lynn should have a remedy. Lynn, as is obvious from Judge Hilder's ruling, was quite satisfied with the result in the divorce. He is not satisfied that he had to expend funds defeating one spurious claim after the other raised by defendants to get the final result he did.

II. COUNT II AND III ADEQUATELY PLEAD SLANDER OF TITLE; THEY DO NOT PLEAD SUFFICIENT FACTS TO MAKE OUT ANY AFFIRMATIVE DEFENSES.

The trial court dismissed the slander of title claims of FRLC and FFP, assigned to Lynn, based on several affirmative defenses raised in Cathie's motion to dismiss:⁴ (1) judicial privilege; (2) as to FFP, claim preclusion; and (3) based on the statute of limitations. Such dismissal was erroneous.

A. The Affirmative Defense Of Judicial Privilege Was Not Proved Based On the Amended Complaint's Allegations.

In order to be successful on the affirmative defense of judicial privilege, defendants would have had to show that the Amended Complaint's allegations, alone, under Rule 12(b)(6), prove: (1) The statement was made during or in the course of judicial proceedings; (2) the statement has some reference to the subject matter of the proceeding; and (3) the statement was made by a judge, juror, litigant or counsel. See *Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997). Since Cathie's affidavit was intended to be filed in her divorce proceeding, element (1) is clearly established by the

⁴The Utah Supreme Court recently reiterated the general impropriety of asserting affirmative defenses in Rule 12(b)(6) motions, premised on allegations outside of the complaint, itself:

Because dismissal under rule 12(b)(6) is "justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim," 5A Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1357 at 345 (2d ed. 1990)(emphasis added), this general rule recognizes that affirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6).

Tucker v. State Farm Mutual Automobile Ins. Co., 2002 UT 54, ¶ 7, 53 P.3d 947, 949-50.

allegations of Amended Complaint ¶¶ 13-14. Element (3), Cathie's status as a party in the divorce litigation, is clearly established by the allegations of Amended Complaint ¶ 5.

FFP and FRLC's title to their real estate was not, however, in any way, at issue in the Divorce Action, to which they were not parties. Therefore, with respect to the second element that the statement has "some reference to the subject matter of the proceeding," the case of *Wright v. Lawson*, 530 P.2d 823 (Utah 1975) is instructive. There, the Utah Supreme Court differentiated the much broader immunity in England from the narrower, American rule, represented by the second element:

It is the rule in England that immunity exists as to any utterance arising out of a judicial proceeding and having any reasonable relation to it, although it is quite irrelevant as to any issue involved. The majority of American courts have adopted the rule that there is no immunity unless particular statements are in some way "relevant" or "pertinent" to some issue in the case. The words "relevant" and "pertinent" have a technical meaning in legal parlance and we believe it would be advantageous to adopt a rule that the statement alleged to be libelous must have some relationship to the cause or subject involved.

Id. at 825 (footnotes omitted). The second element thus represents the narrower, American rule, as expressed by the Utah Supreme Court in *Wright*. Another case also helps illustrate the application of the rule, in determining what constitutes a *lis pendens*, covered by the judicial privilege.⁵

⁵In *Hansen v. Kohler*, 550 P.2d 186 (Utah 1976), the Utah Supreme Court recognized that notices of *lis pendens* are covered by the judicial privilege: "The clear weight of authority describing the office of a *lis pendens* is well stated in *Albertson v. Raboff*, wherein the court reasoned that since the effect of a *lis pendens* is to give constructive notice of all the facts apparent on the face of the pleadings, the recordation of a notice of *lis pendens* is, in effect, a republication of the pleadings. Since the

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The Utah Court of Appeals, in *Winters v. Schulman*, 1999 UT App. 119, 977 P.2d 1218, held that a *lis pendens* was invalid where the claim asserted in a divorce action by the person who recorded the *lis pendens* “did not seek title to or possession of the Utah property.” 1999 UT App. 119 at ¶ 18, 977 P.2d at 1223. The court then remanded to the trial court to determine damages against the attorney who recorded the *lis pendens*, under the wrongful lien statute. Clearly, where title to property is slandered in litigation that does not attack, as part of the pleaded claims, the owner’s title, the slander of the owner’s title **does not** have some reference to the proceeding.

Cathie argued below that FRLC’s property was “at issue” in the divorce proceeding. Cathie Mem. at 7. That assertion is untrue on its face, because the Divorce Action treated only the property of the **parties**, and the real property involved was owned by FRLC and FFP, separate and independent legal entities under the laws of the state of Utah, as the Amended Complaint pleads. Further, the Amended Complaint in this case does not plead the contents of the divorce complaint or of the decree, so there is nothing from which, in the four corners of the amended complaint, from which a conclusion as to the second element of the affirmative defense of judicial privilege could be reached. Under Rule 12(b)(6), the Court must infer that facts exist that would show the statement had no reference to the Divorce Action. What is pleaded is the conveyance of real property, by deeds executed by Cathie, to Foster Rentals, L.C. (“FRLC”), a Utah limited liability company, and Foster Family Properties,

⁵(...continued)
publication of the pleadings is absolutely privileged, the republication thereof by recording a notice of *lis pendens* is similarly privileged.” *Id.* at 190 (footnote omitted).

L.C. ("FFP"). Amended Complaint, ¶¶ 12, 15-16 (R. 20), 34-36 (R. 24-25). The Amended Complaint pleads that Cathie falsely asserted in her affidavit that either Lynn or Cathie owned an interest in that real property, when in truth she knew FRLC and FFP owned it. The Amended Complaint also pleads that FRLC and FFP pursued separate litigation to obtain, and did obtain, a quiet title judgment. Amended Complaint, ¶ 17 (R. 20).

Lynn is entitled, on a Rule 12(b)(6) motion, to the reasonable inference that, had the Divorce Action contained any claims that the deeds to FRLC or FFP were procured by fraud, or in any way void, such that Lynn or Cathie had any interest, that the divorce court would have had jurisdiction over the claims and the quiet title action would not have gone forward, because that court would not have had jurisdiction. Since the quiet title action did go forward to judgment, no such claims as to ownership of an interest could have existed thereafter in the divorce action.

Also, the Court must, on a Rule 12(b)(6) motion, infer that FRLC and FFP, necessary parties to any such claim, were not joined as a parties in the Divorce Action, so no such claims could have been part of that action. Because the validity of FFP's and FRLC's ownership of their real property was not a cause in or the subject of the Divorce Action, the second element of judicial privilege in that the statement does not have "some reference to the subject matter of the proceeding." This is no different from recording a *lis pendens* in a divorce proceeding where title to real property is not at issue and being liable under the wrongful lien statute.⁶

⁶Lynn notes that Cathie argued that "in the Ruling dated December 24, 2001, the
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B. The Affirmative Defense Of Statute of Limitations Was Not Proved Based On the Amended Complaint's Allegations.

Defendants successfully convinced the trial court that Counts II and III of the Amended Complaint, representing the assigned claims of FRLC and FFP for slander of title are barred by a one-year statute of limitations, citing to UTAH CODE ANN. § 78-12-29(4), which applies to actions “for libel [and] slander. . . .” *Id.* Defendants had cited *Valley Colour v. Beuchert Builders, Inc.*, 944 P.2d 361 (Utah 1997), for the proposition that the claims of FRLC and FFP arose at the times FRLC and FFP incurred their special damages, namely, on the dates the respective quiet title actions were resolved.⁷ The Utah Supreme Court has recognized, however, that slander claims, which are personal in nature, are substantively distinct from slander of title claims, which are not personal in nature and deal with injury to economic interests in real property. In *Bass v. Planned Management Servs., Inc.*, 761 P.2d 566 (Utah 1988), the Utah Supreme Court differentiated between the nature of the tort of slander, which is a personal tort, and the nature of the tort of slander of title, which is not a personal tort and does not protect a

⁶(...continued)

court determined that Cathie had a ‘marital interest’ in half of FRLC’s property.” Cathie Mem. at 8. Judge Hilder’s ruling was not part of the pleadings, so Cathie’s proffered interpretation of it was immaterial to her motion to dismiss. This Court must infer, on a motion to dismiss, that Judge Hilder, at most, valued whatever respective ownership in FRLC, as an entity, that Cathie and Lynn held. If the trial court or this Court wanted to go beyond the pleadings it would have to take judicial notice of the Honorable Timothy Hanson’s “Judgment Quieting Title” in FRLC, and against Cathie, entered in Case No. 010901218, in the Third District Court for Salt Lake County, that FRLC obtained on May 3, 2001, seven months before Judge Hilder’s ruling.

⁷Plaintiff does note that those dates are not pleaded anywhere in the amended complaint, and a motion to dismiss pursuant to UTAH R. CIV. P. 12(b)(6) could therefore not be granted on this issue even if the statute Saunders argue is applicable were applicable. However, it is not.

person's reputation:

Use of the term "slander" in the name of the action for slander of title has led to analogies between actions for defamation and actions for slander of title.[] However, **despite the similarity in the names of the torts, there is a basic distinction between the two. They protect separate and unrelated interests.** The tort of slander of title and the related tort of disparagement of property are based on an intentional interference with economic relations. They are not personal torts; unlike slander of the person, they do not protect a person's reputation. Slander of title actions are based only on palpable economic injury and require a plaintiff to prove special damages, whereas injury to personal reputation may be based on both tangible and intangible losses and give rise to presumed and general damages.

Id. at 568 (emphasis added & citation omitted). It is clear from the foregoing statement that the tort of slander of title encompasses special damages flowing from injury to real property.

The Utah Legislature has passed a statute of limitations expressly governing injury to real property, UTAH CODE ANN. § 78-12-26(1), which provides a limitations period as follows: "An action may be brought within three years . . . for . . . injury to real property. . . ." *Id.* The judgment of the Legislature in providing a specific statute of limitations for injury to real property must control over the general slander limitations period. See *Taghipour v. Jerez*, 2001 UT App. 139, ¶ 13, 26 P.3d 885, 888 (It is a "well-established rule of construction that specific statutory provisions prevail over general statutory provisions.").

Assessing the identical question under California's statutes of limitations, and relying on the substantive distinctions between the nature of the torts, like the Utah Supreme Court has articulated in *Bass*, the United States Court of Appeals for the Ninth

Circuit reached the inescapable conclusion that the three year, injury to real property statute, not the one year defamation statute, was the applicable limitations period:

“Slander of title is a tort action for redress of an invasion of a particular property right, that of immediate salability [sic] of the property involved. As a cause of action arising out of a violation of a property right it survives the death of its owner.” . . . In the face of this reasoning by the California courts, it would seem that an action for “slander of title” to real property is within the three year limitation applicable to “an action for trespass or injury to real property” rather than within the one year limitation period [for libel and slander]. The trial judge was in error in holding that this action was controlled by [the one-year limitations period] which deals with personal injuries, such as libel, slander, assault, battery, false imprisonment, seduction and injuries resulting from negligence.

Howard v. Hudson, 259 F.2d 29, 32 (9th Cir. 1958)(citation in quotation omitted). The same conclusion logically pertains under Utah’s statutes, in light of the Utah Supreme Court’s recognition in *Bass* of the substantive differences between the two torts and the Legislature’s adoption of a limitations period specific to injury to real property.

C. The Affirmative Defense Of Claim Preclusion Was Not Proved Based On the Amended Complaint’s Allegations.

The trial court erroneously granted defendants’ claim preclusion argument as to Count II. The claim preclusion affirmative defense fails, on a Rule 12(b)(6) motion, because it requires that the Court assess facts outside of those pleaded in the Amended Complaint that would be essential to establishing any such affirmative defenses. This tactic is improper on a rule 12(b)(6) motion. See *Colman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990)(limiting review on a rule 12(b)(6) motion “solely to the material allegations of [the] complaint . . .”)⁸

⁸The Utah Supreme Court recently reiterated the impropriety of asserting
(continued...)

The judgments quieting title in FRLC and FFP do not release Saunders, Law Firm or Couillard as joint tortfeasors, and Saunders, Couillard and Law Firm were not parties to the quiet title actions. FFP has not asserted any claim against Cathie for slander of title, for the reason that it settled with its claim, as against Cathie, as part of obtaining its judgment. FRLC's judgment of quiet title contains no release of any person. It is therefore not possible for claim preclusion, an affirmative defense, to be established by the Amended Complaint's allegations, so as to allow any dismissal pursuant to Rule 12(b)(6).

III. THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT IN FAVOR OF CATHIE AND COUILLARD ON COUNTS IV AND V.

It is undisputed that Cathie, herself, created a relationship with Lynn by placing Lynn's name and social security number on her tax return. It is an obvious risk that reporting false information to the Internal Revenue Service may trigger an audit. It is also an obvious risk that the audit might involve Lynn where Cathie has falsely reported information concerning Lynn's filing status and deductions, using Lynn's social security

⁸(...continued)
affirmative defenses in Rule 12(b)(6) motions, premised on allegations outside of the complaint, itself:

Because dismissal under rule 12(b)(6) is "justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim," 5A Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1357 at 345 (2d ed. 1990)(emphasis added), this general rule recognizes that affirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6).

Tucker v. State Farm Mutual Automobile Ins. Co., 2002 UT 54, ¶ 7, 53 P.3d 947, 949-50.

number. All of those facts are undisputed. Cathie therefore clearly had a duty, when submitting Lynn's name and social security number on her tax return to the Internal Revenue Service, to do so in such a fashion as to avoid the foreseeable risk of an audit of Lynn's own, individual return, based on the false information Cathie reported.

Significantly, the issue is not whether Cathie would foresee in this particular case how the Internal Revenue Service would in fact respond – it was foreseeable that an audit could result from such inaccurate reporting. The RESTATEMENT (SECOND) OF TORTS states: “If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.” RESTATEMENT (SECOND) OF TORTS § 435(1).

Cathie's assertions that she could not have foreseen that her filing of a false return would damage Lynn are therefore not capable of affording her a defense, and summary judgment should not have been granted to her. This is especially true in the face of Lynn's affidavit, R. 408-446, which, based on the information that was available to Lynn even in the absence of the commencement of discovery, raises many issues of fact about the circumstances of the filing of Cathie's false tax return, R. 410-413, at ¶¶ 9-14, the intent of the filing, *see id.*, and Cathie and Couillard's credibility, R. 413-422, at ¶¶ 15-17.

It is noteworthy that Cathie filed a copy of Lynn's tax return in this litigation, in violation of a protective order that had been entered in the Divorce Action. *Id.* R. 416, at ¶ 16. That brazen disregard of Judge Hilder's protective order, alone, would allow the inference of bad faith in Cathie's filing of the false return and the possible intent of

doing harm to Lynn.

The trial court had already sustained the viability of Lynn's interference cause of action in Count V of the Amended Complaint, when it denied the motion to dismiss that claim. Nothing had changed between the time of that ruling and the motion for summary judgment on Count V. There clearly is a prospective economic advantage to Lynn in procuring his tax refund timely. While Cathie argued that she did not act with intent to interfere or with knowledge to a substantial certainty that her conduct would interfere, those are factual issues that should have been allowed to be explored in discovery, and, as to which, Lynn's affidavit, R. 408-446, raised a genuine issue of material fact.

Cathie argued that she did not make her false filing for an improper purpose or by improper means. Again, those are fact intensive issues. The trial court's grant of summary judgment was presumably based, again, on its erroneous conclusion that the interference was not foreseeable. As pointed out above, such a conclusion, without a factual record to support it, and in light of the genuine issues of material fact concerning Cathie and Couillard's credibility and intent, cannot be sustained on summary judgment.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ALLOW DISCOVERY ON COUNTS IV AND V BEFORE CONSIDERING SUMMARY JUDGMENT.

Counts IV and V of the Amended Complaint sought relief for damages caused to Lynn by the occurrence of an IRS audit of his individual tax return, which audit, Lynn alleges, was caused by Cathie's filing of a false, joint return. Lynn suffered substantial expense in the course of being required to hire an accountant to respond to the audit, and he suffered lost investment opportunity for the substantial refund he would have

received much sooner than he did, but for the audit. Lynn cast his theories for that relief as a breach of duty and interference claim. UTAH R. CIV. P. 56(f) allows a court to refuse a motion for summary judgment where essential discovery has not yet been taken. See UTAH R. CIV. P. 56(f).

In this case, the Rule 56(f) Affidavit of David W. Scofield, explains that the facts surrounding the relationship between Couillard and Cathie, which are pertinent to Counts IV and V, are exclusively within the knowledge of Couillard, Cathie and Saunders, and would be revealed fully only by document requests to those three persons and by taking their depositions. Couillard and Cathie had not even filed an answer at the time of their motions for summary judgment on Counts IV and V, and discovery in the case had not even commenced. The issues of the case had not been framed to allow for preparation of any discovery plan and no discovery had taken place.

To the extent that the issue of whether Couillard was the agent of Cathie was material to the case, it is an issue that could not proceed on summary judgment until discovery was completed. Even Cathie's memorandum supporting her motion conceded that "[w]hether an agency relationship exists depends on the facts and circumstances of the case." Cathie's MSJ Memo at 7 (R. 335). The motion is clearly premature on that issue.

The trial court apparently based summary judgment on Counts IV and V on its ruling, as a matter of law, that it **could not be foreseeable** that the filing of a false, joint, tax return by one spouse, would trigger an audit of the truthful, individual, tax return filed by the other spouse. That conclusion by the trial judge discounts completely the very real possibility that Cathie intended to cause an audit of Lynn by her own filing

and sought advice from Couillard as to how to assure that such events would happen, seemingly by accident. Since no discovery was afforded to Lynn, he was not allowed any opportunity to develop that possibility. Further, the conclusion of law that an action by the IRS was “unforeseeable,” in the absence of any discovery from the IRS or from Couillard, who works on tax returns as part of his business, is unsupportable. IRS practices, as could be disclosed in its deposition, combined with Couillard’s knowledge of them as could be disclosed in his deposition, might very well lead to the conclusion that it was, in the circumstances of this case, foreseeable that an audit would result, or might have enabled Lynn, based on the testimony, to hire an expert witness who could opine as to the foreseeability.

The trial court’s refusal to allow any discovery as to the facts and circumstances of the filing of Cathy’s false tax return, her dealings with Couillard with respect thereto, and the practices of the IRS generally in choosing audit targets and specifically in this circumstance, all of which is clearly material to the issues in the case and all of which is outside the knowledge of Lynn, was a clear abuse of discretion. Lynn was damaged by the audit. The audit plainly was the result of Cathie filing a false, joint tax return. The trial court should have afforded Lynn a fair opportunity to prove his claim.

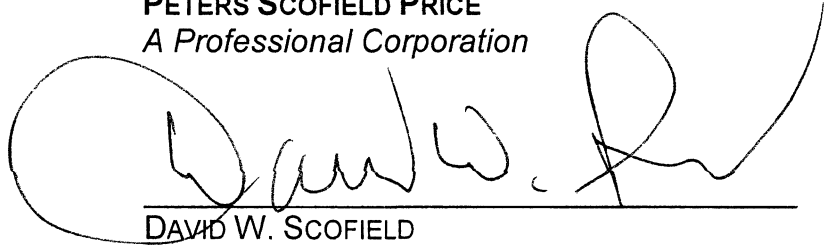
CONCLUSION

Based on the foregoing the dismissal of Counts I, II and III and the summary judgment in favor of Cathie and Couillard on Counts IV and V should be reversed, the defendants should be ordered to file an answer and the case should be remanded for

further proceedings.

RESPECTFULLY SUBMITTED this 12th day of October, 2004.

PETERS SCOFIELD PRICE
A Professional Corporation



DAVID W. SCOFIELD
Attorneys for the Appellants

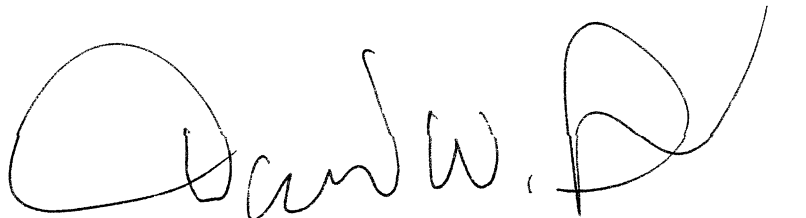
CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellants' Opening Brief were mailed, postage prepaid, this 12th day of October, 2004, to the following:

Gary R. Couillard
Gary R. Couillard/CPA
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James E. Seaman
HENRIKSEN & HENRIKSEN, P.C.
320 S. 500 East
Salt Lake City Utah 84102

Amy Sorenson
Matthew Lalli
Nathan Wheatley
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City UT 84101



David W. Scofield

ADDENDUM 1

Addendum 1

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the

mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

ADDENDUM 2

Matthew L. Lalli (6105)
Amy F. Sorenson (8947)
Nathan E. Wheatley (9454)
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15 West South Temple, Suite 1200
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Facsimile: (801) 257-1800

Attorneys for Defendants Evelyn L. Saunders and
Saunders & Saunders

FILED DISTRICT COURT
Third Judicial District

OCT 06 2003

By SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LYNN G. FOSTER,

Plaintiff,

vs.

EVELYN L. SAUNDERS; SAUNDERS &
SAUNDERS; GARY COUILLARD; AND
CATHIE I. FOSTER,

Defendants.

ORDER

Case No.: 030902227

Honorable William B. Bohling

This matter came before the Court for hearing on August 4, 2003, on the motions to dismiss of defendants Evelyn L. Saunders and Saunders & Saunders (collectively, "**Saunders**"), Cathie I. Foster ("**Foster**"), and Gary R. Couillard ("**Couillard**"), and on plaintiff Lynn G. Foster's ("**Plaintiff**") motions to strike and to amend. Amy F. Sorenson and Nathan E. Wheatley appeared on behalf of Saunders, C. Richard Henriksen and Rick C. Mellen appeared on behalf Foster, Couillard appeared *pro se*, and David W. Scofield appeared on behalf of Plaintiff.

452

After having considered all memoranda and authorities therein, the arguments of counsel, the pleadings, and for good cause shown,

IT IS HEREBY ORDERED that

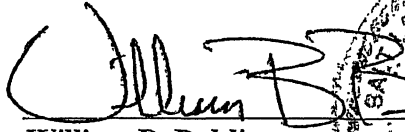
1. Plaintiff's first claim in the amended complaint (the "**Complaint**") for wrongful initiation, use and/or continuation of civil proceedings against Saunders, Foster, and Couillard is dismissed with prejudice for failure to state a claim upon which relief can be granted because it is barred by the judicial proceedings privilege and because the tort applies to the wrongful institution of civil proceedings, not arguments, as a matter of law;
2. Plaintiff's second claim in the Complaint, for slander of title against Saunders and Foster, and his third claim, for slander of title against Saunders, are dismissed with prejudice for failure to state a claim upon which relief can be granted because they are barred by the judicial proceedings privilege, by the doctrine of claim preclusion, and by the one year statute of limitation for libel and slander, set forth at Utah Code Ann. § 78-12-29(4);
3. Accordingly, Saunders' Motion to Dismiss is granted, and the Court dismisses the first, second, and third claims of Plaintiff's Complaint against Saunders with prejudice; Foster's Motion to Dismiss is granted in part and denied in part, and the Court dismisses only the first and second claims of the Complaint against Foster with prejudice; Couillard's Motion to Dismiss is granted in part and denied in part, and the Court dismisses only the first claim of the Complaint against Couillard with prejudice;
4. Foster and Couillard shall refile their motions to dismiss the fourth and fifth claims in the Complaint, for breach of duty and for interference with prospective

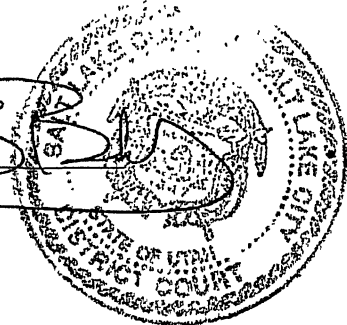
economic relations, as motions for summary judgment, which motions shall include statements of material undisputed fact as required by Utah Rule of Civil Procedure 56;

5. Plaintiff's Motion to Amend is denied on the grounds that amendment can not cure the defects in the claims for wrongful initiation of civil proceeding and slander of title, and that there is no need for amendment as to the claims for breach of duty and interference with prospective economic relations; and
6. Plaintiff's Motion to Strike is denied.

DATED this 3 day of ^{October}~~August~~, 2003.

BY THE COURT:


William B. Bohling
District Court Judge

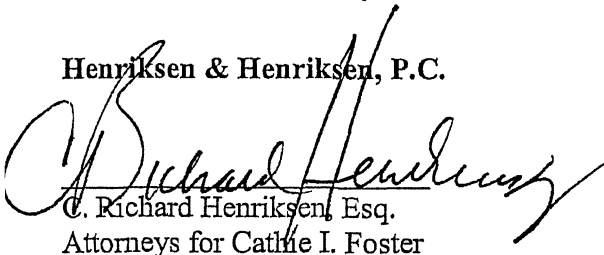


APPROVED AS TO FORM:

Parsons Kinghorn Peters, P.C.

David W. Scofield, Esq.
Attorneys for Plaintiff Lynn G. Foster

Henriksen & Henriksen, P.C.


G. Richard Henriksen, Esq.
Attorneys for Cathie I. Foster

Gary R. Couillard, *Pro Se*

economic relations, as motions for summary judgment, which motions shall include statements of material undisputed fact as required by Utah Rule of Civil Procedure 56;

5. Plaintiff's Motion to Amend is denied on the grounds that amendment can not cure the defects in the claims for wrongful initiation of civil proceeding and slander of title, and that there is no need for amendment as to the claims for breach of duty and interference with prospective economic relations; and
6. Plaintiff's Motion to Strike is denied.

DATED this ____ day of August, 2003.

BY THE COURT:

William B. Bohling
District Court Judge

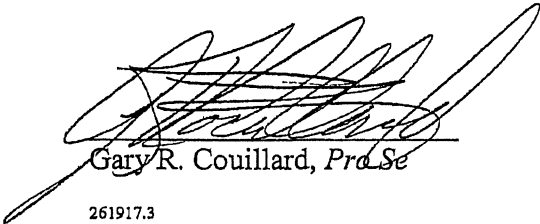
APPROVED AS TO FORM:

Parsons Kinghorn Peters, P.C.

David W. Scofield, Esq.
Attorneys for Plaintiff Lynn G. Foster

Henriksen & Henriksen, P.C.

C. Richard Henriksen, Esq.
Attorneys for Cathie I. Foster



Gary R. Couillard, *Pro Se*

261917.3

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2003, a true and accurate copy of the foregoing Order was sent via first-class mail, postage prepaid, to:

Harold L. Reiser
David W. Scofield
Parsons Kinghorn Peters, PC
111 East Broadway, Suite 1100
Salt Lake City, UT 84111

C. Richard Henriksen
Rick C. Mellen
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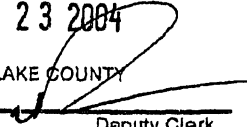
Gary R. Couillard, *Pro Se*
372 I Street
Salt Lake City, UT 84102

Karen Burton

ADDENDUM 3

FILED DISTRICT COURT
Third Judicial District

C. RICHARD HENRIKSEN, JR., #1466
JAMES E. SEAMAN, #8750
AARON W. FLATER #9458
Attorneys for Defendant, **Cathie I. Foster**
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Salt Lake City, Utah 84102
Telephone: (801) 521-4145
Facsimile: (801) 355-0246

JAN 23 2004
SALT LAKE COUNTY
By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LYNN G. FOSTER

Plaintiff,

vs.

EVELYN L. SAUNDERS; SAUNDERS &
SAUNDERS; GARY COUILLARD; AND
CATHIE I. FOSTER

Defendants.

* **ORDER GRANTING SUMMARY**
* **JUDGMENT**

*
*
*
*
* Case No. 030902227
* Judge William B. Bohling
*

This matter came before the court on Defendant, Cathie I. Foster's Motion for Summary Judgment on the 22nd day of December 2003. The Plaintiff and his attorney David W. Scofield were present, the Defendant, Cathie I. Foster and her attorney C. Richard Henriksen, Jr. were present and Gary Couillard appeared pro se. The court after

a review of the various memoranda concerning Defendant Cathie I. Foster's Motion for Summary Judgment from both parties and after hearing arguments of counsel, the pleadings and for good cause shown, the court hereby finds and orders as follows:

1. The court finds that there are no genuine issues of material fact upon which a reasonable jury could find in favor of the Plaintiff on either the fourth cause of action or the fifth cause of action.

2. The court finds that Plaintiff's Rule 56(f) objection is not well taken as no further discovery needs to be taken to determine the issues remaining in this case.

3. The court finds that there was no duty or breach of duty that would be applicable to either the fourth or fifth cause of action.

4. The court finds that there was no foreseeability of harm with regards to potential damages that might arise from the mistake on the tax return, thus creating no potential liability on the fourth and fifth causes of action.

5. That the Plaintiff has failed to establish that he can prove that any of Defendant Cathie I. Foster's conduct was the cause of the harm or injury that Plaintiff may have incurred.


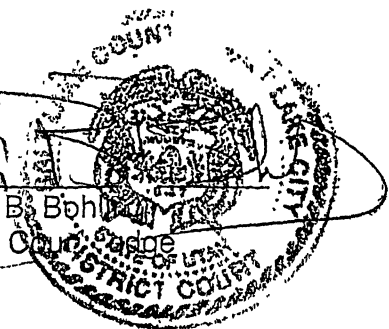
6. The court finds that there was no merit in the bringing of the fourth or fifth cause of actions.

7. The court finds that there is no genuine issues of material fact that exist in this case that would prevent the court from granting the Motion for Summary Judgment on the fourth and fifth causes of action.

WHEREFORE based upon the foregoing findings and the memorandum, pleadings on file and the arguments in this case the court orders that the Plaintiff's fourth and fifth causes of action are dismissed with prejudice, as to Defendant, Cathie I. Foster.

DATED this 27 day of February, 2004.

BY THE COURT:


William B. Bohm
Third District Court, Judge


Approved as to form:

David W. Scofield
Attorney for Plaintiff Lynn G. Foster

Approved as to form:

Gary R. Couillard, Pro Se

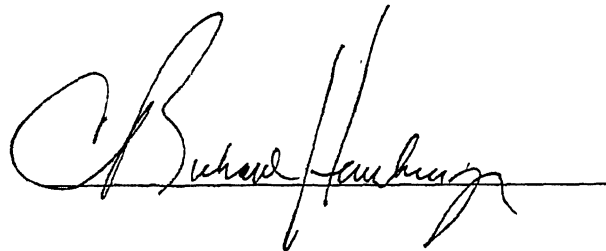
CERTIFICATE OF MAILING

I hereby certify that on this 12 day of January, 2004, a true and correct copy of the foregoing **ORDER GRANTING SUMMARY JUDGMENT** was mailed postage prepaid, to the following:

Amy Sorensen
Matthew Lalli
Nathan E. Wheatley
15 West South Temple
#1200
Salt Lake City, Utah 84101

David W. Scofield,
185 South State Street, Suite 700
Salt Lake City, Utah 84111

Gary R. Couillard, *pro se*
184 "S" Street
Salt Lake City, Utah 84103

A handwritten signature in black ink, appearing to read "Richard Hensley", written over a horizontal line.

William B. Bohling
District Judge
Third District Court
450 S. State Street
Salt Lake City, Utah 84111

030902227

FILED DISTRICT COURT
Third Judicial District

MAR 10 2004

SALT LAKE COUNTY

By

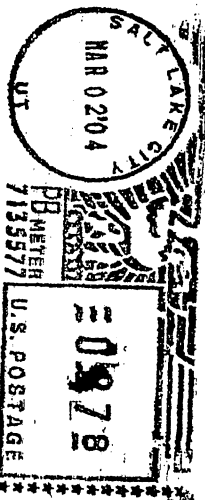
SB
Deputy Clerk

RETURN SERVICE
REQUESTED

PRESORTED
FIRST CLASS

HAROLD L. REISER, ESQ.
DAVID W. SCOFIELD, ESQ.
185 S. STATE STREET, SUITE 700
SALT

PARSONS TIME EXP RTN TO SEND
FORWARD DAVIES KINGHORN PETERS
111 E BROADWAY STE 1100
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ADDENDUM 4

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PETERS SCOFIELD PRICE
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340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

Attorneys for Plaintiff

FILED DISTRICT COURT
Third Judicial District

MAR 25 2004

By SALT LAKE COUNTY
Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

LYNN G. FOSTER,

Plaintiff,

-vs-

EVELYN L. SAUNDERS; SAUNDERS &
SAUNDERS; GARY COUILLARD; and
CATHIE I. FOSTER,

Defendants.

**STIPULATION TO ENTRY OF ORDER OF
SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT COUILLARD ON THE SAME
GROUNDS AS SUMMARY JUDGMENT WAS
GRANTED IN FAVOR OF CATHIE I. FOSTER**

Case No. 030902227

Judge William B. Bohling

Plaintiff and Defendant Gary Couillard, as the only defendant remaining with claims against him, agree and stipulate as follows:

1. On February 27, 2004, the Court signed its order granting summary judgment in favor of Defendant Cathie I. Foster and against Plaintiff, which order was entered on March 1, 2004.

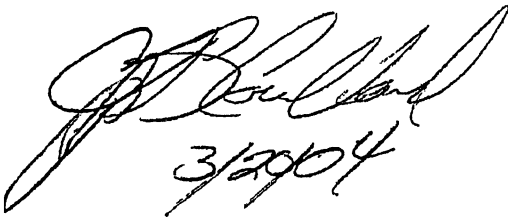
2. Defendant Couillard had filed, on December 29, 2003, a motion to join in

636

Cathie I. Foster's arguments and motion for summary judgment. The Order of summary judgment entered by the Court on March 1, 2004, does not deal with Couillard's motion, and Couillard therefore remains a party hereto. Nevertheless, Plaintiff and Defendant Couillard believe that the Court's order with respect to Cathie I. Foster would also apply to the claims against Couillard. Therefore, to avoid unnecessary expense and duplication of effort, Plaintiff and Defendant Couillard stipulate and agree that an order may be entered upon his pending motion, granting a summary judgment in favor of Defendant Couillard, and against Plaintiff, on the same grounds as the summary judgment was granted in favor of Defendant Cathie I. Foster.

3. The parties to this Stipulation jointly move for entry of an order in accordance herewith.

DATED this 9th day of March, 2004.



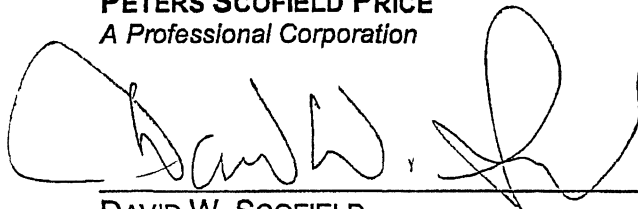
3/2004



Gary Couillard, Pro Se

Digitally signed
by Gary R.
Couillard, CPA
Date: 2004.03.09 3/9/04
19:34:26 -07'00'

PETERS SCOFIELD PRICE
A Professional Corporation



DAVID W. SCOFIELD
Attorneys for Plaintiff

ORDER


Based on the foregoing stipulation, and good cause appearing,

IT IS ORDERED:

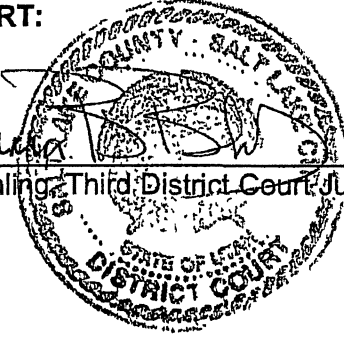
That summary judgment is entered against Plaintiff and in favor of Defendant Couillard, on the same grounds as summary judgment was heretofore entered in favor of Defendant Cathie I. Foster, thereby disposing of all claims against all parties.

DONE this 23 ^{month} 4 day of ~~June~~, 2003.

BY THE COURT:



William B. Bohling, Third District Court Judge



ADDENDUM 5

MAY 24 2004

By [Signature] SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

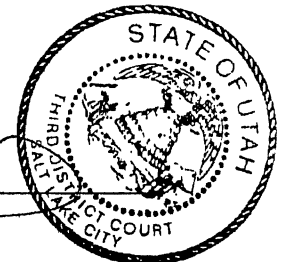
LYNN G. FOSTER,	:	MINUTE ENTRY DECISION
	:	AND ORDER
Plaintiff,	:	
	:	CASE NO. 030902227
vs.	:	
	:	
EVELYN L. SAUNDERS; SAUNDERS &	:	
SAUNDERS; GARY COUILLARD; and	:	
CATHIE I. FOSTER,	:	
	:	
Defendants.	:	

Before the Court is plaintiff's Motion to Alter or Amend Judgment, submitted on plaintiff's May 5, 2004, Notice. Neither party requested oral argument.

Having considered the parties' Memoranda, and good cause appearing, the Motion is denied. The Court is persuaded by the arguments set forth in defendant Evelyn Saunders' and Cathie Foster's Memoranda addressing the issues of law. The Court perceives the argument as a renewal of the factual issues that have been previously addressed by this Court and the divorce judge, and believes the claim was properly dismissed under Gilbert v. Ince, 981 P.2d 841. This constitutes the Order of the Court. No other Order need be submitted.

Dated this 24 day of May, 2004.

[Signature]
WILLIAM B. BOHLING
DISTRICT COURT JUDGE



1219

MAILING CERTIFICATE

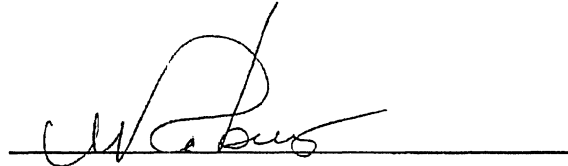
I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 24 day of May, 2004:

David W. Scofield
Attorney for Plaintiff
111 E. Broadway, Suite 340
Salt Lake City, Utah 84111

Matthew L. Lalli
Amy F. Sorenson
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C. Richard Henriksen
Attorney for Defendant Foster
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Gary R. Couillard
Pro se
184 S Street
Salt Lake City, Utah 84103

A handwritten signature in black ink, appearing to read "C. Richard Henriksen", is written over a horizontal line.